United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,052

ERNEST E. DYER
Appellant,

v.

UNITED STATES OF AMERICA
Appellee.

On Appeal From a Judgment of Conviction Under Title 22 — 1304, D. C. Code in the United States District Court for the District of Columbia

JAMES R. SCULLEN
648 Warner Bldg.,
Washington, D. C.
Counsel for Appellant

STATEMENT OF QUESTIONS PRESENTED

1. Were Appellant's rights under the Fifth and Sixth Amendments of the Constitution violated?

2. Was the Trial Court's instruction on the element of criminal intent clear and correct?

3. Was the evidence legally sufficient to support a judgment of conviction for a violation of Title 22 — Section 1304, D.C. Code.

INDEX

CITATIONS

CASES:

---

* Cases chiefly relied upon.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,052

ERNEST E. DYER
Appellant,

v.

UNITED STATES OF AMERICA
Appellee.

On Appeal From a Judgment of Conviction Under Title 22 – 1304, D. C. Code in the United States District Court for the District of Columbia

---

BRIEF FOR APPELLANT

STATEMENT OF CASE

About 12:20 A.M. on June 12, 1965, Appellant was walking south on North Capitol Street when he observed two men running toward him. One man, named Parrish, ran past Appellant and into his home at 2409 North Capitol Street. A second man, named Freeman, had a foot and a half stick raised as if to strike Parrish when he reached him. T.P. 11, 12, 26, 27. Appellant had a suit of clothes with him and was proceed-

ing to his home on North Capitol Street. He held Freeman until Parrish told him they were playing; that there was no assault or housebreaking taking place. Both Freeman and Parrish said Appellant told them he was a police officer, displayed a badge, told them to go into the house. T.P. 12.

Deciding Appellant was not a police officer, although he was dressed in dark pants, and had a gun holster, a gun, and a badge, according to both men T.P. 16, 38, 39, they called the police.

The testimony concerning Appellant's possession of a gun was equivocal. Freeman testified he did not know if Appellant pulled a gun because "my back was to him". But I saw it in the holster. T.P. 16. Parrish testified Appellant had "something in his hand, looked like a pistol to me". T.P. 38, 39. At T.P. 51, Parrish said "it appeared to be a gun . . . to tell the truth, I can't say whether it was a real gun or a play gun". T.P. 52.

The police arrived within minutes of the call. T.P. 79. Appellant was arrested, searched and subsequently charged with impersonation of a police officer. No gun was found then or later. The first officers on the scene were never identified nor did they testify.

Appellant was arraigned on June 12, 1965. Counsel was appointed by the Arraignment Judge. Appellant was later indicted on Six Counts.

On December 22, 1965 appointed counsel filed a Motion to Withdraw which was granted and a trial date of January 11, 1966 was set. On December 24, 1965 the United States District Court appointed new counsel.

Second appointed counsel sent two letters to Appellant requesting an interview. Appellant did not meet with his second appointed counsel until trial date January 11, 1966 in Court — fifteen minutes prior to trial. T.P. 116 A trial resulted in a Judgment of Acquittal on Counts 2, 3, 5, 6 and conviction on Counts 1 and 4. A sentence of 8 months to

2 years was imposed, on Count 1 to run concurrently with the same sentence on Count 4 of the Indictment. The trial judge granted Appellant's petition to proceed in forma pauperis on the 17th day of February, 1966. This Court appointed counsel. A Motion for Bond Pending Appeal was filed which this Court granted. This appeal followed.

SUMMARY OF ARGUMENT

The mere appointment of counsel by the District of Columbia Court of General Sessions on June 12, 1965 and the United States District Court on December 24, 1965 did not satisfy the requirements of the Sixth Amendment that the accused shall have the "assistance" of counsel within the purview of the Constitution. *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019. Despite the holding by this Court in *Diggs v. Welch,* (1945) 80 U.S. App. D.C., that the allegation of ineffective assistance of counsel will not be maintainable under the Sixth Amendment once competent counsel has been assigned the accused and the later holding in *Mitchell v. U.S.,* (1957) 1046 U.S. App. D.C. 57 that the Constitutional requirement is purely procedural Appellant asserts the "assistance" of counsel provision has been construed to mean "effective assistance" of counsel. Glasser v. U.S., (1942) 315 U.S. 60; 62 S.Ct. 457.

The so-called "mockery of Justice" test established in *Diggs v. U.S., supra,* has no definitive legal meaning. Whether appointed counsel has rendered effective assistance from the time of appointment to time of trial depends upon the circumstances of the particular case.

Appellant, however, is entitled to relief under the Fifth Amendment of the Constitution as well as the Sixth Amendment because of the failure of due process, i.e., a fair trial.

It is inconceivable that a Six Count Indictment can be defended without a thorough investigation of all the facts — but second appointed counsel for Appellant first met his client in Court — fifteen minutes prior

to trial. A lack of facts hampered trial counsel and prevented complete vindication. The mere fact Four Counts of the Indictment collapsed without defense is not, in the total light of the facts, indicative of effective assistance of counsel and due process.

The Trial Court erroneously charged the jury by refusing to define criminal or felonious intent as an "evil" intent. Once the Court embarked upon an explanation of what was meant by a criminal intent a duty arose to define the intent so that a lay person would differentiate that intent from ordinary or general intent. Although defense counsel finally acceded to Court's reluctance to insert word "evil" in the charge, his persistence in seeking its insertion would allow this Court to invoke its authority under Rule 52 (b) FRCrimP and notice the error. *Byrd v. U.S.*, (1965) 119 U.S. App. D.C. 360, 342 F2d 939.

The evidence presented by the Government, taken in its most favored light, was insufficient in kind and quality to sustain a judgment of guilty for Counts One and Four of the Indictment.

ARGUMENT

POINT I.

Appellant's Rights Protected by the Fifth and Sixth Amendments of the Constitution Were Violated.

(A) The Sixth Amendment

This Court in *Diggs v. Welch*, (1945) 80 U.S. App. D.C. 5; 148 F2d, 667, 670 and *Mitchell v. U.S.*, (1957) 104 U.S. App. D.C. 57; 259 F2d, 787, establishes a rule which imposes a heavy burden upon an appellant allegedly aggrieved by ineffectual assistance of counsel or a failure of due process. It has been said, somewhat loosely, that such rights are guaranteed by the Constitution. From a review of the cases, however, where effective assistance of counsel and due process [Fair Trial] are involved, it is most difficult to find the guarantors.

Appellant respectfully suggests to this Court that the "mockery of justice test" so frequently alluded to in antecedent cases is anachronistic! It also does violence to the concept of simple justice! It ignores the grim realities inherent in the administration of criminal justice! It favors superficial adherence to the prescribed constitutional safeguards rather than literal compliance with the mandate.

If the concept enunciated in *Diggs v. Welch, supra,* and reiterated in *Mitchell v. U.S. supra,* were to be literally applied in Appellant's case the appointment of counsel, presumably competent, by the Court of General Sessions for the District of Columbia on June 12, 1965, for Appellant, satisfied the constitutional requirement although counsel exerted no effort on behalf of Appellant because of failure of fee. If the constitutional mandate is purely procedural, as announced, in *Mitchell v. U.S., supra,* the protection afforded is reduced to a high sounding platitude utterly devoid of substance. Nor was the appointment of trial counsel on December 22, 1965, so remedial that Appellant's rights were finally secured under the Sixth Amendment. Although a trial date of January 11, 1965, did not necessarily preclude adequate time for trial preparation, it was a short interval, and counsel's lack of investigation of the facts, was an impediment he was never to overcome once trial began. Specific illustrative examples will be set forth *infra.* The failure of counsel and Appellant to meet prior to trial, irrespective of fault, is indicative that the "assistance" of counsel provision was not fairly complied with even though the procedural requirement may have been fulfilled when appointment was made.

The body of law, which evolved from a disposition of post conviction motions and habeas corpus petitions, which have afflicted the federal courts for years, places such stringent requirements upon petitioners that complaints involving alleged violations of the Sixth Amendment rarely prevail. But Appellant's case does not involve a post conviction motion filed "years after the actors are gone". *Mitchell v. U.S., supra.*

The actors are here: the events are fresh: the facts not hoary with age and clearly discernible when exposed by investigation. Presumably this differentiates this case from *Mitchell v. U.S., supra, Edwards v. U.S.*, (1958) 103 App. D.C. 153: 256 F2d 707.

Presumably the burden of sustaining an appeal based upon a violation of the Sixth Amendment is consonant with the majority's opinion in *Mitchell* rejecting a post conviction motion "that questions open an appeal must be raised by appeal is a rule of law, and it is a sound and solid rule" p. 792 and that burden is, of course, less onerous.

Appellant pointed out to this Court in his Motion for Bond Pending Appeal, subsequently granted, that it seems indisputable that he did not have assistance of counsel within the meaning of the Constitution from June 12, 1965 until December 22, 1965. This is true even when the test in *Diggs, supra,* is applied. The mere appointment of counsel under the applicable local rule by the District of Columbia Court of General Sessions Rule 24(3)(a)(i) did not afford "assistance of counsel". The events which followed appointment clearly disclose active "non-assistance". Appellant's Counsel having unilaterally determined, again in accordance with the rules, that Appellant was able to pay a fee and refused to do so lapsed into a truculent exchange with Appellant which, far from advancing Appellant's legal position produced reciprocal hostility, inaction, and indubitably, some bewilderment. Thus a valuable period of time during which the Courts were under an assumption that preparatory efforts were being exerted on behalf of Appellant, was irrevocably lost!

The question then remains whether the appointment of new counsel on December 22, 1965 and assignment of a trial date on January 11, 1966 satisfied the requirements of the Sixth Amendment of the Constitution. Appellant respectfully states the answer must be a vigorous "NO" for the following persuasive reasons:

1. The loss of preparatory time from June 12, 1965 until December 22, 1965 was never restored partially or totally.

2. The time from actual appointment of new counsel December 24, 1965, until January 11, 1966 was, in the light of the prevailing facts, inordinately short. There was no exchange of facts and law between appointed counsel; a holiday season extended to January 2, 1966; *one later attempt* (emphasis added) to meet with Appellant by second counsel on December 29, 1965 failed through Appellant's fault.

3. Second appointed counsel's preparation of the law was, of necessity, based upon the assumption, that the Government's version of the incident leading to arrest was correct. This dangerous assumption, in a criminal case, places counsel at a marked disadvantage.

4. It does not appear that defense and prosecution witnesses were interviewed and their versions of the incident verified and/or contradicted.

5. No attempt was made, *preparatory to trial* (emphasis supplied) by motion or request, to utilize the information obtainable under the discovery rules and the Jencks rule from the Government. Counsel did, *at the trial* (emphasis supplied) invoke the Jencks rule by oral motion, which was granted, but its utility at that point, as a source of substantive or impeachment evidence was eroded. T.P. 21.

6. A two letter attempt to contact defendant Appellant prior to trial was insufficient effort to determine why defendant was not cooperating, if, in fact, he was not. Upon appointment by the United States District Court, counsel was required to do more than prepare for trial by legal research. Counsel was required to use whatever effort was needed to obtain the facts. One such endeavor was to contact the defendant or attempt to do so by diligent, persistent, exhaustive effort. A defense predicated upon a unilateral version of the facts is tantamount to no defense at all!

The Motion for Bond pending Appeal required this Court's appointed counsel to "visit" various places, meet and interview certain persons, obtain supporting letters. It would appear that preparation for trial within the meaning of the words "assistance of counsel" would require minimally similar effort.

Appellant respectfully asserts the two appointments of counsel by two courts failed to accord "assistance of counsel" within the purview of the Sixth Amendment.

(B) The Fifth Amendment

While Appellant cannot agree with the narrow legal concept asserted in *Diggs v. Welch, supra,* that "once competent counsel is appointed his subsequent negligence does not deprive accused of any right under the Sixth Amendment", nevertheless, under the circumstances of this case, Appellant is still entitled to relief. *Jones v. Huff,* 80 U.S.App.D.C. 254, 152 F2d 14. Cases which at least broaden the scope of *Diggs* are: *Avery v. Alabama,* (1940) 308 U.S. 444, 60 S.Ct. 321, 84 L. Ed. 377; *Glasser v. U.S.,* (1942) 315 U.S. 60, 62 S.Ct. 457, 86 L. Ed. 680. The words "effective assistance of Counsel" have been used and generally adopted. This Court, however, in *Mitchell v. U.S., supra,* and *Edwards v. U.S.,* (1958) 103 App. D.C. 153, 256 F2d 707, retaining the concept in *Diggs* that the appointment of counsel is purely procedural, despite the presence of the word "Assistance" in the Sixth Amendment held that "mere improvident strategy, bad tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel, unless taken as a whole, the trial was a "mockery of Justice".

But *Mitchell* does concede that "failures of counsel" may violate the due process clause of the Fifth Amendment. Examined closely the term "mockery of justice" can have no definitive legal meaning. One simple but egregious mistake, interspersed with otherwise effulgent defense tactics, resulting in the unfair loss of life or liberty, is a

"mockery of justice". Conversely, a defense replete with tactical error, may under certain circumstances, be an effective defense. The test should be whether the acts of commission or omission taken singly or as a whole, deprived Appellant of presenting his position, factually and legally, to the jury, consistent with elementary principles of fair play and what reasonable men term substantial justice. *Malkinski v. People of the State of New York*, 324 U.S. 401, 65 S.Ct. 781.

Appellant inquires of this Court whether the following acts, taken individually or collectively constitute due process, i.e., a fair trial, under the Fifth Amendment of the Constitution in the conduct of the trial:

1. The acquisition by Appointed counsel, of Defendant's version of the event for the first time in Court just prior to or during trial. T.P. 116.

2. The failure to interview, prior to trial, Albert Freeman, one of the principal Government complaining witnesses which led to ex tempore random cross examination eliciting damaging uncorroborated hearsay evidence and little or nothing of value to Appellant. T.P. 32, 44, See *Pinkard v. U.S.*, 99 U.S. App. D.C. 394, 240 F2d 632.

3. The failure to interview, prior to trial, Charles V. Parrish, a second principal Government complaining witness which led to a rambling direct testimony necessary according to defense counsel "so I can get a picture". T.P. 38.

4. The failure to interview, prior to trial, William Edwood Russ, whose name as a witness was available from police records from the time of arrest and booking of Appellant. A check of distance, lighting, bias, etc., was imperative. T.P. 55, 58.

5. The propounding of argument for a Motion for Judgment of Acquittal, which was properly advanced, with only a partial comprehension of

the facts which were readily available had pretrial investigation of facts taken place. T.P. 101-115.

6. The failure to allow defendant to testify in his own behalf on the erroneous assumption of law that his criminal record would militate against him and be useful to the Government for impeachment purposes. A careful analysis of Appellant's record indicates *no convictions for felonies* (emphasis added), and counsel might well have eliminated the impeachment value of the misdemeanors, assuming the principle found in *Campbell v. U.S.*, 85 U.S. App. D.C. 133; 176 F2d 45, would permit their use. Parenthetically it might be added that the use of an accused past record of misdemeanor convictions or forfeitures for impeachment purposes is not followed by a majority of the State and Federal Courts. See Courts ruling, sua sponte, T.P. 43, 44 which if applied to defendant appellant's record, would have eliminated use of drunk and disorderly charges against Appellant for impeachment purposes. The rationale being that it is basically unfair to deprive an accused the right to testify in a serious felony case despite a number of convictions for minor offenses. These Courts recognize that the accused is often convicted on his record without sufficient evidence of guilt being adduced by the Government for the crime being considered. See *U.S. v. Poe*, 233 F. S. 173. That Defendant's testimony was absolutely essential to deny the elements of the crime, which were outlined in the instructions to the jury at T.P. 161, 162 can hardly be questioned. But counsel's lack of familiarity with the facts, the record, and the law on this point placed defendant within the 99% category referred to by the Motions Judge in *U.S. v. Poe, supra.* And see T.P. 7 where jury is promised that defendant would testify if any evidence needed rebuttal.

7. The failure to subpoena one William Branch who had information relative to Appellant's duties as a special police officer which would have included the need for a holster, Exhibit #6; cartridge carrier, Exhibit #7; key ring holder and patrol box key, Exhibit #9. This infor-

mation was vital to Appellant, not to show greater authority or any authority to arrest as a special police officer but to disclose to the jury that these items of apparel were regularly in Appellant's possession and were not part of a masquerade used by Appellant to usurp police functions. A fair reading of the transcript of the trial shows the jury must have concluded as the prosecution intended, T.P. 137, 165, 166, 167, that Appellant had no occasion to wear the items and their presence on his person and his acts were part of a dangerous charade consciously adopted by the Appellant.

8. The failure to subpoena the records of the District of Columbia National Guard where Appellant was serving as a police officer attached to the 171st Police Battalion. Moreover, once counsel had knowledge of this fact T.P. 84, Appellant's immediate superior or his nominee was available by phone call to testify as to the duties and equipment used by Appellant in line of duty. The importance of this testimony in the light of the jury's request for the exhibits cannot be overemphasized. It was also important in light of the prosecutor's argument that to acquit defendant was comparable to "commissioning him to act like a police officer when in fact, he was not". T.P. 152, 153.

9. The failure of counsel to adhere to his request for instruction on the need to show Appellant acted with an evil state of mind. T.P. 125. See *Levine v. U.S.*, 104 U.S. App. D.C. 281, 261 F2d 747. That confusion existed and persisted on this subject is patent at T.P. 123, 124, 125, 126, 127.

The mere facade of due process is not enough! The deprivation of one's liberty should be predicated upon a conviction founded on the actual facts. Here a conviction resulted, however inadvertently, upon a contrived set of facts.

Appellant respectfully asserts that he had a fundamental right to place the facts before the jury and for reasons beyond his control, out-

lined above, they were not. And this failure flagrantly violated his rights under the Fifth and Sixth Amendments of the Constitution.

II

The Court's Charge on the Element of Criminal or Felonious Intent, as an Element of the Crime Was Erroneous.

A careful reading of the transcript from T.P. 122 through 127 shows defense counsel and the learned, and eminently fair trial judge, failed to comprehend and apply, the instruction approved by this Court in *Levine v. U.S.*, 104 U.S. App. D.C. 281; 261 F2d 747. This lack of mental rapport was conceded by the trial Judge at T.P. 123 as follows:

> The Court: You are not communicating very well with me.
> Counsel: I am sorry.
> The Court: I am sorry, maybe it is my fault.

The breach of misunderstanding narrowed at P. 125 when the Court agreed to charge the jury on criminal intent. This Court, without equivocation, described it as:

> " . . . the common law concept of crime as a combination of an evil state of mind with the doing of an evil act applies to this felony".

On T.P. 125 the Court recognized that defense counsel wanted "criminal intent" defined to include an "evil intent". At T.P. 126 the Court seemingly omitted the word "evil" as it reconstructed the desired charge. Counsel reiterates his desire for interlineation of "evil" at T.P. 127, and the Court does not comment. The heart of the charge, as defined in *Levine,* was excised at T.P. 164 where defense counsel capitulates to Appellant's detriment.

It is clear that the Court was of the impression that the instruction which stated, as it did, that the Government must prove a criminal or

felonious intent was sufficient. The elaboration of the charge on criminal or felonious intent avoids "an evil state of mind with the doing of an evil act" concept. It is equally clear the Court, inadvertently, but erroneously, felt this instruction referred to Title 22, Sec. 1306. See T.P. 115, 122, where the additional element of fraudulent design appears. The evil apparently inherent is the added element of fraud.

Appellant asserts that counsel's acquiesence finally, after persistent effort to make his point, does not deprive this Court of the right to note the confused concept of the law presented to the jury and rectify the matter in the interest of substantial justice.

III

The Evidence Was Legally Insufficient To Support a Conviction for a Violation of Title 22, Sec. 1304 and Defendant's Motion for Judgment of Acquittal Should Have Been Granted.

Without the benefit of Appellant's version of the incident leading to his arrest the tenuousness of the Government's Six Count Indictment is manifest when we observe the vapidity of the Counts once exposed to examination by the Court.

Counts 2, 3, 5 and 6 were the subject of directed judgments of acquittal, despite a total lack of defense! What evidence was presented by the Government which led to the conviction on Counts 1 and 4? Freeman and Parrish admit that Freeman was chasing Parrish with a "foot and half branch" *as though to use it as a weapon* if he caught Parrish T.P. 26, 27, 33, 34. Appellant intervened. According to Freeman he held him, showed him he had a badge, said he was a police officer, asked him if he was housebreaking and when Parrish assured him they were not, told them to go into the house. T.P. 18. The time was about 12:30 A.M. Appellant had a suit of clothes he had just taken from his mother's home, 2401 North Capitol Street, in his possession. T.P. 15, 16. Par-

rish on direct examination reiterated the same version of the facts. Both Freeman and Parrish said Appellant did not look like a police officer T.P. 18. 38. although Appellant was alleged to have what appeared to be police pants, a gun. a holster and badge. They called police. The police arrived within minutes after the call T.P. 76. They arrested and searched Appellant and found no gun. However, Exhibits Nos. 6, 7, 8 and 9 were taken from Appellant at the scene or at the station. T.P. 63, 65. Neither the Government nor defense elicited any evidence as to why Appellant was in possession of these items although defense obliquely, and obviously hampered by a lack of vital facts, tried to adduce evidence that Appellant was a special police officer and the Government sought to prove he was not so commissioned. T.P. 88, 89, 90. Of course the Government knew, or could have known with simple inquiry, that Appellant was a police officer, assigned to the 171st Police Battalion, stationed at Military Police, Battalion Headquarters at the District of Columbia Armory, but chose to exclude any reference to this possible weakness in the debris that constituted the remainder of the Government's case. T.P. 127, 128, 131, 132.

This case is easily distinguished from *Taylor v. U.S.*, 83 U.S. App. D.C. 21, 167 F2d 752; *Levine v. U.S.*, 104 App. D.C. 281, where the accused took the initial action which led to arrest. Here Appellant observing an admitted incident, fraught with potential violence, intervened. His actions were spontaneous [putting his suit of clothes aside] T.P. 15, and, in order to gain control of the situation allegedly asserted he was a police officer. There was not a scintilla of evidence that he said he was from a precinct as in *Taylor* and *Levine*, that he was a Metropolitan Police Officer; that the badge purported to be anything more than it was a special police badge; that he attempted to gain some personal advantage or that he persisted once order had been restored. *Where, taking the Government's version in its most favored light, is the evil*

state of mind accompanied by an evil act? A different view might appear if the complaining witnesses were conversing harmlessly but they were in full flight, T.P. 26, 28, and one had a weapon, which from its description might well be characterized as a dangerous weapon! T.P. 26. The fact that it was not used for its ostensible purpose does not alter the picture as it was presented to Appellant.

Apparently the trial Court, in deciding to allow the case to go to the jury, did so with some reluctance. T.P. 110, 115. 'I am having trouble to conclude that the jury could find that he attempted to perform the duty or exercise the authority pertaining to the office of police officer. *He didn't take them anywhere! He went up to where there was some disorder* (emphasis added) T.P. 110, 115. Appellant asserts the Court would have had greater reluctance had the entire factual picture been presented! But the Court and Prosecutor lost sight of an elemental fact. A citizen does have a right to prevent the perpetration of a felony about to be committed in his presence. *Kurtz v. Moffitt,* 115 U.S. 487; 29 L Ed. 458; 6 S.Ct. 148; *Bright v. Patton S. Mackey,* 534, 60 Am. Rep. 396; Wharton's Criminal Procedure 10th Ed. (1957) P. 258, 1602.

Would this Court, Appellant respectfully inquires, approve of a citizen trained in police work, stand by, *in order not to become involved,* and watch a serious or fatal assault take place? Or a housebreaking occur? And would such intervention, accompanied by the words "I am a police officer" said in the heat of the moment constitute a violation of law?

What was the Government's rationale and approach to the successful prosecution of Counts One and Four? Was the Government's position on the facts and the law characterized by candor or by sophistry?

The Government said that the Motion for Judgment of Acquittal should be denied because Appellant "wished to present himself as a police officer for whatever satisfaction this gives him" and to bully

"around". T.P. 114. The specious argument fails because of certain singular facts and conclusions which obtrude:

1. At the time of the incident Appellant was engaged in the innocent pursuit of taking his suit of clothes to his home nearby.

2. Two men, one with a foot and a half stick were chasing each other. T.P. 26, 27.

3. The time was 12:30 A.M. an unusual hour of the day for *romping in play* (emphasis added).

4. The Government apparently made no attempt to learn why Appellant was in possession of certain police equipment.

5. The Government did not exhibit even a slight curiosity about the mysterious disappearance of a gun allegedly displayed by Appellant. The disappearance having occurred between the time of the call 12:25 and 12:30 A.M. The casual search of the vicinity does not suffice for answer since Appellant did have a holster and cartridge holder. The Government, without recourse to Appellant, could have determined when, where, and under what circumstances Appellant carried a gun. Inquiry, of course, would have led to the discovery that Appellant was not being a "vigilante" or "disguising" himself as a police officer. T.P. 150.

6. The Government was less than candid when it successfully presented Appellant as a person, who, for purposes of self aggrandizement, purchased and wore police equipment to "give the impression that he is a police officer" T.P. 131, "palming themselves off as a police officer" T.P. 135, 139; "when an individual attempts to indicate to others that he is a policeman without having any supervision over him, without having any understanding of what the rights and obligations of a police officer are; then he involves the integrity of the police officer". T.P. 135.

Simple inquiry by the Government would have disclosed that Appel-

lant had a need for the equipment on his person; that he had been engaged in police work in the National Guard, often in conjunction with the Metropolitan Police Department; that he did have supervision; that he knew the rights and obligations of a police officer; and that this data was readily available at the National Guard Headquarters, District of Columbia Armory.

But the prosecutor knew his remaining hope of salvaging a conviction from the abortive indictment lay in depicting Appellant as a vigilante without a vestige of police experience which was untrue: as poseur without credentials of any kind as a police officer which was untrue; and as a buffoon and bully whose only desire was to intervene so he could perpetrate a crime of assault which was untrue, and, in short, a Don Quixote of North Capitol Street filled with malevolent delusions of grandeur highly inimical to the "integrity of the Metropolitan Police Department" which was untrue.

The lack of a frontal assault on this caricature of the facts allowed this view of Appellant to prevail.

7. The entire incident lasted but a few minutes. Once order was restored and Appellant was satisfied the disorder had terminated he departed. There is no suggestion he intervened for personal gain of any kind or had any "evil" motive nor was any proven.

Appellant respectfully points out to this Court that it would be incongruous to require less proof of criminal intent under Section 1304 which is a felony, than under 1306 because of the added words "with fraudulent design which is a misdemeanor. The trial Court had no difficulty understanding the Government's lack of proof on the question of fraudulent or evil design and struck it down as a matter of law on the violation alleged under Sec. 1306.

It would appear as a matter of cold logic that the legislative intent was to regard Title 22 — 1304 as the more serious offense and this Court so construed the Statute and crime in *Levine v. U.S., supra.*

The trial Court allowing the case to go to the jury, with reluctance, seemingly accepted the Government's version that the act and intent of Appellant did not have to be evil per se in order to constitute a violation of Section 1304. It is Appellant's position that the evidence presented of an evil act coupled with an evil intent fell short in quantum and quality requisite for a conviction under the Statute.

CONCLUSION

A fair summary of the events leads one to the inescapable conclusion that the entire case was "much ado about nothing"! It was Shakesperian in character also in that it encompassed tragedy as well as comedy. Having been arrested on a series of errors, appellant was subjected to the inexorable processes of the criminal law, which, here, involved an unnecessarily complex indictment, less than adequate legal protection, and eventual imprisonment.

This case should be reversed.

Respectfully submitted,

JAMES R. SCULLEN
648 Warner Bldg.,
Washington, D. C.
Counsel for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,052

ERNEST E. DYER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

Cr. No. 926-65

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
EDWARD T. MILLER,
Assistant United States Attorneys.

QUESTIONS PRESENTED

I. Does the record before this Court support appellee's contention that he was deprived of his right to effective assistance of counsel and a fair trial? If not, may he introduce matters *dehors* the record on this appeal in support of his contention?

II. Was the charge to the jury relating to the element of criminal intent deficient for failure to include the precise language proposed by appellant?

III. Does the evidence adduced at trial support appellant's conviction?

INDEX

TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,052

ERNEST E. DYER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant Ernest E. Dyer was convicted January 12, 1966, after a two-day trial to a jury before Judge McGarraghy on two counts of a six count indictment filed August 16, 1965. His motion for judgment of acquittal was granted at the close of the government's case as to the other four counts which charged him with violations of 22 D.C. Code §§ 1306, 502 and 3204. He was sentenced to concurrent terms of eight months to two years imprisonment on the two counts charging him with impersonating a police officer (22 D.C. Code § 1304).

The record shows that the incident out of which the charges against him arose occurred at 12:30 a.m. June 12, 1965, after two rowdy young men who were "horsing around" had raced past appellant, Freeman, the pursuer, apparently chasing Parrish, the pursued, with an eighteen-inch stick (Tr. 11-14, 24, 26-27, 45-46, 36-37). Parrish succeeded in entering his house and slammed the door behind him (Tr. 12-13). Freeman outside on the porch tried to open the door and stuck his stick through the mail slot and yelled at Parrish inside (Tr. 14, 27, 37, 46-47). Appellant who was wearing clothes similar to a police officer's and carrying a holster with a pistol in it, then went up to Freeman, displayed a police-like badge, indicated that he was a police officer, and "arrested" him, pointing what appeared to be a pistol at him. In addition, appellant twisted his arm and bent him over the porch bannister (Tr. 14-17, 20, 37-39, 47-51, 56-57). After he had been prevailed upon to release his victim, appellant departed the scene. But Parrish and Freeman, however, suspected that he might not have been a policeman and called the police who arrived shortly thereafter and arrested appellant, recovering from his person the badge, a holster, cartridge case, a patrol box key, and other items resembling those worn and used by a police officer (Tr. 18, 31-32, 40, 63-64, 71-72). The police files, however, contained no record of appellant's having ever been a police officer or even a special police officer (Tr. 88-89, 90-91). Testimony that appellant had pointed a gun which was never recovered at the two complainants was not sufficient to satisfy the judge, who refused to permit the charges of possession and assault with the gun to reach the jury (Tr. 52-53, 79-81, 102). He was similarly dissatisfied with proof of fraudulent design (Tr. 112-16).

The record on this appeal also shows that after appellant was indicted on August 16, 1965, he was arraigned and entered a not guilty plea on the advice of his counsel on September 9. In a motion filed December 9 and argued and granted December 20, appellant's first counsel, Mr.

William A. Tinney sought to withdraw on the grounds, inter alia, that appellant had refused to abide by the agreed retainer, had refused to obtain other counsel, and had failed to appear at Mr. Tinney's office to prepare his defense and that there was a general failure of rapport between counsel and his client. Two days later, on December 22, Mr. Tinney's appointment was vacated and trial counsel, Mr. Blaine P. Friedlander was appointed. Trial was had the following January 11, 1966. The record discloses no objection to this date or request for a continuance. The only information contained in the record regarding appellant's relations with his trial counsel are his assertions in his motion for release on bail to this Court and his counsel's statement that despite his efforts he had not succeeded in meeting appellant prior to the first day of trial (Tr. 116-17).

SUMMARY OF ARGUMENT

I

The record discloses a statement by trial counsel that despite communications appellant did not consult with him until the day of trial. But the record, which on its face neither discloses nor suggests ineffective assistance of counsel nor lack of a fair trial, also shows that appellant had appointed counsel for seven months before his trial. It shows that an effective, thorough and obviously prepared defense to a case involving relatively simple facts was presented at trial and resulted in judgments of acquittal on four of six counts in the indictment. And it shows that no objection or request for delay was ever made by either appellant or his trial counsel, who had three weeks notice and who may justifiable have felt it was futile to rely very much upon appellant for help. Appellant, of course, may not rely upon assertions relating to matter *dehors* the appellate record to support his untimely contention.

II

It is well settled that appellant is not entitled to have the jury charged in the precise language of a proposed instruction, where as here the substance of his proposed instruction is given.

III

The testimony by the government's witnesses that appellant had identified himself as a police officer, flashed a police badge, and otherwise affected the manner of a police officer in significant respects, was ample, if believed as it apparently was by the jury, to support the charge that appellant had impersonated a police officer and attempted to exercise the authority of the same.

ARGUMENT

I. The record does not support appellant's contention that he was deprived of effective assistance of counsel or a fair trial.

(Tr. 6-11, 22-34, 42-52, 58-60, 73-79, 81-84, 94-108, 120-27, 140-48.)

Without regard to the record before this Court, appellant advances for the first time the completely novel proposition that, because he failed or refused to consult with his attorneys regarding his defense during the seven months that elapsed between his arraignment and his trial, he had been denied his constitutional rights to counsel and a fair trial! Appellant now makes his untimely assertion in disregard of a record which shows that experienced trial counsel after three weeks of notice provided a vigorous and thorough defense throughout the trial to a case involving rather simple facts. The effectiveness of his representation can hardly be gainsaid on a record which shows that judgments of acquittal were entered on four of the six counts in the indictment and which shows clearly that appellant's trial counsel conducted a generally effective and intelligent defense, and,

was alert, for instance, to possible motions which could be made in appellant's behalf (Tr. 8-10, 101-108), thoroughly cross-examined the government's witnesses (Tr. 22-34, 42-52, 58-60, 73-79, 81-84, 94-100), prepared instructions (Tr. 120-27), and made effective addresses to the jury at the beginning and close of trial (Tr. 6-8, 140-48).

Claims of reversal premised on the absence of a lawyer between arraignment and trial must demonstrate prejudice. *Long* v. *United States*, —— U.S. App. D.C. ——, 360 F. 2d 829 (1966); *cf. Kennedy* v. *United States*, 122 U.S. App. D.C. 291, 353 F.2d 462 (1965). *A fortiori*, at least as strong a showing of prejudice should be made in the instant case since appellant was never without assigned counsel between arraignment and trial. This record, however shows only that an obviously diligent trial counsel agreed to the trial scheduling and did not seek an extension of time either to prepare more fully for trial or for any other preparatory purpose. See *Long* v. *United States*, *supra* at 835. Appellant himself voiced no objection. And, insofar as there was any deficiency in preparation, counsel did not deem it worthy of mention.

In any event any disadvantage suffered seems to have been exclusively appellant's fault. The claim in the record, therefore, is without merit.

Having failed on the record, the appellant may not properly introduce, as he has, a battery of assertions regarding matters *dehors*, the appellate record for consideration on this appeal (Brief of Appellant, pp. 7, 9-11).[1]

---

[1] The record, for instance, provides no support whatever for appellant's contention that he was *not allowed* to testify in his own behalf on the erroneous assumption of law that he could be impeached by his criminal record (Brief of Appellant, p. 10). In the first place, no explicit reason for this tactical decision is manifest. But secondly, implicit from this record is the probability that trial counsel quite reasonably concluded that the posture of the government's case made acquittal more likely if appellant did not testify. Neither does the record disclose what particular efforts appellant's trial counsel made in preparing his case. Appellant, of course, was not the only source of the facts. And in light of the allegations contained in appellant's first counsel's motion to withdraw, trial

Schley v. *Pullman Car Co.*, 120 U.S. 575, 578 (1887); *Beach* v. *United States*, 80 U.S. App. D.C. 160, 149 F.2d 837, *cert. denied*, 326 U.S. 745 (1945); *Smith* v. *United States*, 343 F.2d 539 (5th Cir.) *cert. denied*, 382 U.S. 861 (1965); *United States* v. *Young*, 301 F.2d 299 (6th Cir. 1962); see *Edwards* v. *United States*, 312 U.S. 473, 482 (1941). The only way now open to explore the effects of his own apparently negligent or willful disregard of his interests, is by collateral attack, not assertions *dehors* the record on this appeal.[2]

II. The trial court's charge to the jury on the element of criminal intent was not defective solely for failure to employ the precise language requested by appellant.

(Tr. 122, 126-27, 162-62.)

The trial judge included in his charge to the jury relating to proof of criminal intent precisely the language requested by appellant except that he refused to include the word "evil" before the word "intent."[3] *Levine* does

---

counsel may not unreasonably have decided that depending upon appellant for assistance would be like waiting for Godot.

[2] 28 U.S.C. § 2255. Appellee does not mean to suggest that such a quest would prove fruitful for it is obvious from this record that any dispassionate assessment of appellant's cause shows that he could not begin to bear the heavy burden even he in effect concedes that he must bear in order to prevail over precedent. *Edwards* v. *United States*, 103 U.S. App. D.C. 152, 256 F.2d 707 *cert. denied*, 358 U.S. 847 (1958); *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 259 F.2d 787 (1957), *cert. denied*, 358 U.S. 850 (1958); *Diggs* v. *Welch*, 80 U.S. App. D.C. 5, 148 F.2d 667, 670, *cert. denied*, 325 U.S. 889 (1945). Nor does his particular predicament provide the impetus to storm the barriers of established law under the banners of "fair play" or "substantial justice". (Brief of Appellant, p. 9.)

[3] Appellant's proposed instruction read:

> You are instructed that in the District of Columbia criminal intent is the evil design, resolve or determination in the mind of the defendant. (Tr. 122.)

The court charged the jury as follows:

> I said to you that the Government must prove a criminal or

not support appellant's contention that the word "evil" should be included in the charge, because that case held only that since an instruction going to the issue of intent was requested, "it was error to fail to instruct the jury that in order to convict it must find not merely that the accused acted as charged in the indictment but that he did so *with criminal or felonious intent.*" (Italics supplied.) *Levine* v. *United States*, 104 U.S. App. D.C. 281, 285, 261 F.2d 747, 751 (1958). It is well settled, as the *Levine* case implies, that a party has no right to insist that instructions be couched in his own language when the court's instructions have adequately covered the point. *E.g. Agnew* v. *United States*, 165 U.S. 36 (1897); *Ramey* v. *United States*, 118 U.S. App. D.C. 355, 336 F.2d 743, *cert. denied*, 379 U.S. 840 (1964); *Wheeler* v. *United States*, 82 U.S. App. D.C. 363, 165 F.2d 225 (1947), *cert. denied*, 333 U.S. 829 (1948). Defense counsel as much as admitted this and that he was merely attempting to gain a slight dividend if he could when the following colloquy occurred:

> After citing and quoting from Witters v. United States, 70 App. D.C. 316, 319, 106 F.2d 837, 840,

---

felonious intent. I will now charge you on what we mean by that.

Intent is the essence of all crime. The question for you to decide is what was the intent of the Defendant with which he did this act on the date specified. In that regard, you should take into consideration all of the testimony in the case to arrive at the intent he had in his mind.

In the District of Columbia, criminal intent is the design, resolve or determination in the mind of a defendant. One human being cannot read what is in the mind of another. Only the all-seeing eye of the Almighty can do that. Words and actions before and after the alleged offense should be considered by you and you should gather from them and draw your conclusion as to the Defendant's intent.

Intent means that the person had the purpose to do a thing. It means that he makes an act of the will to do a thing. It means that he contends to the doing of it. Intent may be deduced from circumstances, from things done and from things said, and a person is assumed to intend the natural and probable consequences of his act. (Emphasis supplied.) (Tr. 162-63.)

(1939) in support of the language in the proposed instruction. appellant's trial counsel stated:

> Now I have added a little here. I have added the word "evil," but if the Court would like to strike that out, that is all right. I was trying to help my cause a little.
>
> THE COURT: So I gathered. . . . (Tr. 126-27.)

III. The evidence in the record was ample to support appellant's conviction.

(Tr. 11-18, 20, 24, 26-27, 31-32, 36-40, 45-51, 56-57, 63-64, 71-72, 88-91)

Ample evidence, the inferences from it being viewed as they must be in the light most favorable to the government, supports the trial court's decision to submit the two counts charging appellant with impersonating a police officer to the jury and supports the jury's verdict. Since the only real issue was whether the government's witnesses were credible, assessment of the government's case was clearly within the province of the jury. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947); *Morton* v. *United States*, 79 U.S. App. D.C. 329, 147 F.2d 28, *cert. denied*, 324 U.S. 875 (1945).

Nor can appellant so easily avoid the effects of *Taylor* v. *United States*, 83 U.S. App. D.C. 215, 167 F.2d 752 (1948), whose extraordinarily similar facts show that the government amply proved its case under the relevant statute (Brief of Appellant, p. 14). In *Taylor*, *supra*, two plain clothes police officers were parked in violation of applicable parking regulations and Taylor, the defendant, affecting the behavior of a police officer. ordered them to move. In the instant case the two government witnesses though apparently not rowdy enough at the time of the offense to disturb a nearby neighbor. caused appellant to impersonate a police officer by identifying himself to them as a police officer, flashing what appeared to be police credentials, displaying other police-like ac-

couterments, and attempting in significant respects to act as though he had the authority of a police officer (Tr. 11-17, 20, 24, 26-27, 36-39, 45-51, 56-57). This testimony was corroborated by testimony that the badge and other items resembling police accounterments were taken from appellant at the time of his arrest (Tr. 18, 31-32, 40, 63-64, 71-72). The government, however, proved he clearly was not a police officer or even a special police officer. (Tr. 88-91). Appellant's claim of insufficiency of the evidence is clearly without merit.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
EDWARD T. MILLER,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 233734 279